279751

DEPT. OF TRANSPORTATION DOCKETS

2004 MAY -3 A 10:46

Shell Oil Company
Legal
P O Box 2463
Houston
TX 77252-2463
United States of America
Tel +1 713 241 3633
Fax +1 713 241 1427
Email randall.heldt@shell.com
Internet http://www.shell.com

May 3, 2004

VIA FACSIMILE 202-493-2251
Document Management Facility
USCG-2003-14472
US Department of Transportation
Room PL-401
400 Seventh Street SW
Washington DC, 20590-0001

Re: Comments of Shell Chemical LP on NPRM 46 CFR Part 67 and 46 CFR Part 221
USCG-2003-14472 - 19

Shell Chemical LP ("SCLP") offers the following comments on the proposed rulemaking concerning the "lease-financing" provisions for barges engaged in the coastwise trade. The Coast Guard proposed rulemaking concerns restrictions on chartering back lease financed vessels. Those rules would also limit the "grandfather" exceptions for those vessels that obtained endorsements or approvals before February 4, 2004 under the lease-financing provisions. In the notice, the Coast Guard stated, "… if you believe that the review or restriction of charter back arrangements in this limited circumstance will unduly restrict competition in the coastwise trade, we request you provide comments."[1] These comments of SCLP are offered for that purpose.

Summary of SCLP Position.

SCLP is opposed to the proposed changes to the lease-financing provisions. Past rule changes threaten to reduce or even eliminate competition in the "for-hire" segment of more highly specialized barge trades. The harm is mitigated by the current rule, which allows renewals of current endorsements or approvals. It should not be changed.

If the Coast Guard feels that some rollback of grandfathering must take place, it would be more prudent to allow the Coast Guard flexibility to grant renewals beyond 3 years if a showing can be made by applicant that failure to extend the renewal would harm competition or unreasonably affect transportation costs.

---

[1] 69 Fed. Reg. 5406 (2004).

Thus, Section 67.20 (b) and other sections containing the grandfather provision would include, for example:

"A vessel ... may continue to operate under that endorsement for 3 years, ***or thereafter upon showing that failure to extend the renewal would unreasonably restrict competition, might adversely affect transportation costs for applicant, or would unreasonably limit options for applicant to obtain transportation of products,*** and may renew the document and endorsement during that period ..."

Other comments on this and the other the proposed rulemaking are set forth below.

The Shell Business Organization.

SCLP is a limited partnership organized under the laws of the State of Delaware, and is an affiliated entity of Shell Oil Company. Shell has extensive operations in the United States. It's organizations explore, develop, produce, purchase, transport and market crude oil and natural gas. They also purchase, manufacture, transport and market oil, motor fuel and chemical products and provide technical and business services.

Shell Oil Company is an affiliate of the Royal Dutch/Shell Group of Companies. The parent companies of the Group, like other publicly traded companies, have shareholders from many countries, including the United States. However, the parent companies are incorporated in the Netherlands, and the United Kingdom, respectively. As a result, Shell affiliates in the United States do not meet the definition in Section 2 of the Shipping Act of 1920 to operate in the coastwise trade, except by virtue of the ability of particular affiliates to meet the "Bowater" exceptions in 46 USC app. § 883-1.

Barges Currently Qualified Under 12106(e).

Three barges are owned by Triton Leasing, Inc., a Shell affiliate, and are specially designed to transport butadiene. Triton Leasing has as its business purpose "leasing and other financing transactions" and complied in all respects with the requirements of 46 USC § 12106(e). These barges are impacted by the rulemaking.

Triton Leasing demise chartered the barges to a barge operator that is Section 2 qualified. The operator has agreed to provide a crew, and to control and maintain the barges. A time charter has allowed SCLP to provide a single source for cargo, which is butadiene manufactured by SCLP and transported to an industrial customer.

Butadiene, is a gas at normal atmospheric pressure, therefore must be transported in specialized low pressure barges. Each of the three barges has a capacity between approximately 13,000 and 15,000 barrels. These barges transport nearly 70 million pounds of butadiene every year. The barges are not suitable for gasses which must be transported at high pressure and, of course, would not be used for transportation of products that would be liquids at atmospheric pressure.

Restriction of Competition Inherent in Proposed Rule Changes.

The for-hire low pressure barges available in commerce are in a very narrow "niche" market for which there is very little competition. While there are a variety of Section 2 qualified US citizens willing to control and operate the barges, it is another matter entirely to find barge operators willing to invest sufficient capital to own them. An owner with tolerance for financial risk associated with such an expensive asset with such a narrow use is difficult to find. Such highly specialized equipment is not necessarily attractive for ownership by for-hire barge operators.

It is axiomatic that in areas where there is little competition, the opportunity for higher prices is significant. Eventually, higher costs for transportation can translate to higher prices for the American consumer for end products made from these feedstocks.

To avoid higher transportation costs in a market with little competition, the only reasonable solution is to invest capital in a means of transport. The proposed rulemaking jeopardizes the continued ownership of the barges because of the restriction or elimination of the grandfather clause in that section, in combination with the previously changed provisions on leasing "without an element of financing".

SCLP, as an impacted cargo supplier, feels that its interests would coincide with the public interest should indefinite renewals be allowed for these and other similarly situated vessels or barges. Alternatively, exceptions should be granted where it can be shown, as in the present case, that restrictive application of the Coast Guard Rules related to the lease-financing grandfather clause have the likelihood of impacting competition and creating higher prices.

It should be noted that petrochemical competitors of Shell with ultimate US parentage are free to both own *and* operate. Thus, the for-hire barge industry is already subject to an environment where companies own barges to haul their own cargo. The ability of Section 2 US citizen cargo suppliers to own their own specialty barges limits further the number of specialty barge customers for a for-hire owner. In this environment, the Coast Guard should not engage in rulemaking that could push the for-hire market closer to monopoly or near monopoly.

The Triton barge leases allow a Section 2 US citizen barge operator to derive substantial and steady income with relatively low risk. The benefits to a robust and competitive barge industry should be obvious. Such barge operators might not otherwise participate in specialized barge markets because of the financial risk. The income without commitment of capital allows for capital to be employed in the acquisition of less specialized barges, where there is lower risk. This flexibility is the ultimate "win-win" for the barge industry, the specialized chemical industry and the customers of both.

Additional Comments.

Two final points should be added. No direct solution is offered to SCLP by the Bowater Amendments. SCLP originally sought Bowater status, but its application was rejected even though it met the five specific criteria for Bowater status found in Section 883-1 (a) – (e). Its application was denied because this Act, written in the 1950's, used the word "Corporation", and SCLP is a limited partnership. The Delaware Revised Uniform Limited Partnership Act, however, was not passed until 1983. Thus, this and other forms of business that are common today, acting in all material respects in the same manner as corporations, have been excluded, although it is reasonable to conclude they were not contemplated as necessary for exclusion by the authors of the Bowater Amendments.

Comments advocating ever-increasing restriction of the coastwise trade lean toward patriotism and nationalism. The proposed rule changes quote words uttered in 1918 in Congress about "real control" of vessels being "in the hands of aliens"[2] and the avoidance of the same as "vital to the United States military and economic security."[3]
To some extent, the potential harm of the presently configured rules may be overstated. The barges are still physically in the hands of Section 2 US citizens. That operator has, in every respect, the capability of operating and controlling them. In time of national emergency, the worst situation would involve a government order to the US citizen operator to not comply with a sudden change in the sub-charter, if that sub-charter was deemed inconsistent with national security.

On this point of national security, Shell has set forth in Exhibit 1 (following the remainder of its comments to the proposed rulemaking), some evidence concerning its contribution in past and present to the United States and its military objectives in time of true national peril. It is offered not to roll back any of what is *required* by the law or the requirements of Section 2 US citizenship, but to urge that rulemaking remain flexible and not be utilized to restrict what is proper in the current rules.

Specific Comments on Proposed Rules:

Alternative 1 (Sec. 67.20(a)(6)). This alternative would extend the prohibition of the demise charterer from controlling the "direct operation or management" of the vessel to prohibit any member of "group of which that owner is a member" from controlling its operation or management. This does not appear to affect charting back through time charter in order to obtain transport of a proprietary cargo. A contract in which the operator agrees to carry cargo for SCLP for a period of time does not, in our opinion, amount to "direct operation or management" and is consistent with the operator being the "owner pro hac vice". If the Coast Guard does not agree, we would like to know.

---

[2] 69 Fed. Reg. 5394 (2004), *quoting* Congressman Sanders in 56 Cong. Rec. H8029 (June 19, 1918).
[3] 69 Fed. Reg. 5391 (2004).

Alternative 2 (Sec. 67.20(a)(9)). This alternative would not allow a finding that the vessel operator is the owner pro hac vice when the vessel is sub-chartered back to a member of a group including the owner, unless the cargo is proprietary. This alternative would allow charter back by SCLP of the barges owned by Triton and demise chartered to a Section 2 US citizen, since SCLP only transports proprietary cargos, thus we do not have comment.

Section 67.20(b) through (e). These changes propose a limitation on renewals of endorsements after February 4, 2004. This was the effective date of certain restrictions that require demise charter leases to have "some element of financing".

SCLP opposes the further restriction by roll back of grandfathering. SCLP advocates that no changes be made that would limit the period of charters or renewals obtained prior to February 4, 2004. The Triton butadiene pressure barges have a remaining expected life of over a decade and underlying product supply contracts potentially extend further. The changes would disrupt business relationships.

As mentioned above, if the Coast Guard feels that some rollback of grandfathering must take place, it would be more prudent to allow the Coast Guard flexibility to grant renewals beyond 3 years if a showing can be made by applicant that failure to extend the renewal would unreasonably restrict competition, might adversely affect transportation costs for applicant, or would unreasonably limit options for applicant to obtain transportation of products.

Thus, Section 67.20 (b) and other sections containing the grandfather provision would include, for example:

"A vessel ... may continue to operate under that endorsement for 3 years, *or thereafter upon showing that failure to extend the renewal would unreasonably restrict competition, might adversely affect transportation costs for applicant, or would unreasonably limit options for applicant to obtain transportation of products*, and may renew the document and endorsement during that period if ..."

Sections 67.147 and 67.179. These changes would require applicants to provide certifications from an independent auditor. SCLP feels that the Coast Guard, Marad and applicant have sufficient expertise to review documents and the additional expense is not justified.

These comment are respectfully submitted for the consideration of the Coast Guard. Any questions or clarifications of the same may be directed to the undersigned.

Yours truly,

Randall J. Heldt

Randall J. Heldt
Senior Counsel

Exhibit 1

Shell's Historical Record in Wartime Emergency.

Shell Oil Company is a Delaware Corporation chartered in 1922, although operations by Shell companies in the United States trace back even further, to delivery of Shell gasoline by the tanker *SS Romany*, in Richmond Beach, Washington on September 16, 1912.

Between December 1941 and August 1945, the Allied war effort used almost seven billion barrels of oil. The United States was called upon to supply nearly six of those seven billion barrels, some 85% of the total. Virtually all of that oil was transported across the Atlantic and Pacific Ocean by maritime vessels. Oil accounted for half of the cargo shipped overseas in World War II. At the end of the war, it was noted, "at no time did the Services lack for oil in the proper quantities, in the proper kinds, and at the proper places. Not a single operation was delayed or impeded because of lack of petroleum products. No Government agency and no branch of American industry achieved a prouder war record."[4] Shell joined in all of these efforts and in some areas led them.

In transporting oil across the oceans, the Shell group of companies lost 66 vessels, and at a cost of 1,434 lives of officers and crew, most being victims of U-boat warfare. The Shell manned *Ohio*, was in convoy to Malta when repeatedly hit by torpedoes and bombs and yet managed to bring 80,000 barrels of fuel to the besieged island.[5]

At the outbreak of World War II, the Japanese captured Singapore, Java and most of the Pacific surrounding Southeast Asia. Consequently, the United States was deprived of 90% of its normal rubber supply, which at the time was virtually all natural rubber. Within a week of Pearl Harbor, the owners of patents covering the various processes for manufacture of synthetic rubber met in Washington and on December 19, 1941 signed an agreement permitting each signatory company the right to use the others' patents on a royalty-free basis. Quite simply, the war could not have been fought without rubber. Butadiene, a key ingredient of synthetic rubber[6], was an area of expertise of Shell Chemical. The United States Rubber Reserve requested plans for building suitable facilities on the vulnerable West Coast of the United States. Shell contributed to this plan with a facility in Torrance, California. Built from the ground up, it was in operation only eight months after government approval of the plans, and in the first 24 hours of operation, it produced 75 tons, a record for this type of installation. It operated literally next door to a styrene facility operated by Dow and an SBR rubber plant operated by Goodyear and others. During 1944, the Shell Torrance plant produced enough butadiene for ten million automobile tires.[7] The

---

[4] Ralph K. Davies, Deputy Administrator, Petroleum Administration of War, *letter quoted in* Beaton, Kendall, Enterprise in Oil 555 (1957).
[5] Stephen Howarth; A Century in Oil 199 (1997).
[6] Butadiene is also, of course, the product transported by the barges made the principal subject of these comments to rulemaking.
[7] Kendall, *supra at* 588 – 589.

thousands of Americans that work for Shell in the United States take great pride in their company's contribution to America, our economy and our national security.